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Supreme Court, U.S.
FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

* * * * *

BURTON HIGHAM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

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6438

QUESTION PRESENTED

Whether, upon motion under Fed. R. Civ. P. 60(b), where neither a habeas corpus petitioner nor his counsel were notified of the entry of an order denying a timely Rule 59(e) motion, and the fact was not discovered by petitioner or his counsel until eight months after the order was entered, the district court may vacate and re-enter the judgment to permit a timely notice of appeal?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Burton Higham, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals, rendered in these proceedings on March 26, 1999.

OPINION BELOW

The Seventh Circuit Court of Appeals summarily affirmed the denial of petitioner's Fed. R. Civ. P. 60(b) motion in its Cause no. 99-1245. The opinion is unpublished, and is reprinted in the appendix to this petition at page 1a, *infra*. The order of the Seventh Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page 3a, *infra*.

JURISDICTION

The original opinion of the Seventh Circuit Court of Appeals was entered March 26, 1999. A timely motion to that court for rehearing was overruled on June 23, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions involved in this case are set out in full in the Appendix.

U.S. CONST. Art. I §9 (Habeas corpus clause)

28 U.S.C. §2255

Fed. R. Civ. P. 60(b)

Fed. R. App. P. 4(a)

STATEMENT OF THE CASE

Summary. This petition concerns the denial of a motion under Fed. R. Civ. P. 60(b) filed in Mr. Higham's federal habeas corpus (28 U.S.C. §2255) case. The motion requested that the court vacate and re-enter its judgment to permit Mr. Higham to file notice of appeal because Mr. Higham did not receive notice that the court had denied his motion to set aside judgment under Fed. R. Civ. P. 59(e) until nine months after the order was issued.

Facts and procedural history. After a jury trial, Mr. Higham was convicted of attempted murder for hire and mail fraud in connection with a plot to kill a business associate who owed Mr. Higham money in order to collect insurance proceeds. Mr. Higham's defense at trial was that he had been entrapped by John Burroughs into committing the charged offenses, and that Mr. Burroughs had suggested to him in December, 1994, that he arrange for the intended victim, Mr. Yates, to be killed. Mr. Burroughs cooperated with the government and testified against Mr. Higham at trial.

The government presented evidence at trial that while the contact between Mr. Higham and Mr. Burroughs had begun in December, 1994, Mr. Burroughs had not begun to cooperate with the government until January, 1995. Hence, the government argued, Mr. Higham was not entitled to an entrapment defense. The jury was instructed that it could only find entrapment if it believed that Mr. Burroughs was a government agent at the time the plan for the murder was first mentioned.

After trial but before sentencing, counsel for the government tendered to defense counsel a letter from FBI supervisor James Lyle to U.S. Attorney James Burns dated January 19, 1995 which referred to a meeting between government agents and Mr. Burroughs on December 11,

1994. The letter was obviously critical to Mr. Higham's defense that he had been entrapped by a cooperating witness.

At the time he filed his motion for new trial based on newly discovered evidence, trial counsel was aware of the letter. However, in his motion, he mentioned only another late-discovered document and did not raise the issue of the non-disclosure of the letter. As a result, when the same counsel raised the government's failure to disclose the letter as an issue on appeal, the Seventh Circuit Court of Appeals deemed that the issue had been waived because it had not been properly raised in the trial court.

The Presentence Investigation Report in Mr. Higham's case recommended a two-level increase in his offense level because of obstruction of justice, in that Mr. Higham had testified falsely at trial. Although the letter was material to the truth of Mr. Higham's trial testimony, trial counsel did not bring it to the court's attention at sentencing. Mr. Higham was sentenced to 180 months imprisonment.

Mr. Higham's conviction was affirmed on appeal on October 18, 1996. *United States v. Higham*, 98 F.3d 285 (7th Cir. 1996). He then filed a timely petition for habeas corpus relief under 28 U.S.C. §2255, alleging the following grounds:

1. Denial of due process of law when the prosecutor failed to disclose, prior to trial, the letter described above.

2. Denial of effective assistance of trial counsel for failing to include the letter in his motion for new trial.

3. Ineffective assistance of trial counsel for failing to present other evidence at sentencing relevant to the obstruction enhancement.

4. Ineffective assistance of trial counsel for failing to present evidence that rebutted the government's assertions that there was a pattern of violence in Mr. Higham's conduct.

The United States filed a response to the petition. Then, without permitting a traverse by Mr. Higham, the district court denied relief as to each ground on January 2, 1998. As to the first ground, the court found that because the appellate court on direct appeal had found the evidence legally sufficient to convict Mr. Higham, he had not demonstrated prejudice from the non-disclosure of the letter. As to the sentencing claims, the court found that the increase in sentence which could be attributed to ineffective assistance of counsel was not sufficiently significant to allow Mr. Higham to litigate his claims of ineffective assistance of counsel. The court cited *Durrive v. United States*, 4 F.3d 548, 551 (7th Cir. 1993) and *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1997).

Mr. Higham then filed a timely motion for relief from judgment under Fed. R. Civ. P. 59(e) on January 15, 1998. App. 32a. In his motion, Mr. Higham argued that the court had applied the sufficiency of the evidence standard to determine prejudice from the lack of disclosure of the letter, rather than the "reasonable probability" standard required by *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and *United States v. Bagley*, 473 U.S. 667 (1984). He further contended that *Durrive v. United States*, 4 F.3d 548, 551 (7th Cir. 1993) did not apply because the error in sentencing caused a sentencing increase of 29 months, while *Durrive* and *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1997) involved much shorter potential increases of 12 and 16 months respectively. Finally, he argued that the *Durrive* rule should be reconsidered.

On January 21, 1998, a minute order was entered and transmitted to Mr. Higham's counsel reciting that the motion

was taken under advisement, and that a ruling would be given by mail. Neither Mr. Higham, his counsel,[1] nor counsel for the government received any notification from the court of the fact that the motion was denied in an order dated February 11, 1998. [2] On September 9, 1998, lead counsel wrote to the court inquiring as to the status of the motion. No response to this letter was received. On November 17, 1998, at lead counsel's request, local counsel went to the office of the district clerk and checked the court's docket and file. For the first time, counsel learned of the entry of the February 11 order.

Three days later, on November 20, 1998, counsel filed a motion for relief from judgment under Fed. R. Civ. P. 60(b). Included as attachments to the motion were sworn declarations from Mr. Higham and both counsel that they had not received notice of the order. The motion also included the representation, authorized by the assistant United States Attorney who had appeared in the case, that he had not received notice either. The motion sought to have the judgment vacated and re-entered so that notice of appeal could be filed.

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[1] Mr. Higham's lead counsel was not resident in the Northern District of Illinois. As required by local rule, local counsel was designated and entered an appearance. Neither counsel was notified of the entry of the court's order.

[2] This was not the only instance of error in the district and federal courts in this case. Following the filing of notice of appeal, Mr. Higham filed a precautionary motion for certificate of appealability. The trial court ruled on the motion, but no notice of the ruling was sent to Mr. Higham or either of his counsel. Then, after judgment had been entered in the Seventh Circuit, the Seventh Circuit issued its mandate before the time for filing a petition for rehearing had expired. The court notified lead counsel of the issuance of the mandate in *another* case. Fortunately, district court local counsel, who did not appear in the Seventh Circuit, was notified of the issuance of mandate in *this* case. Upon subsequent motion, the Seventh Circuit withdrew its mandate.

The district court found as a matter of fact that no notice had been issued. However, it further found that it lacked jurisdiction to grant the relief sought because Fed. R. App. P. 4(a)(5) and (6) provided the only mechanism for extending the time for appeal. App. p. 4a. Petitioner filed notice of appeal from the denial of the Rule 60(b) motion to the Seventh Circuit Court of Appeals. That court did not set the matter for briefing, but instead directed the parties to file "jurisdictional statements." After receiving the statements, the court affirmed the judgment of the district court. A timely motion for rehearing was overruled.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS AN UNWARRANTED NARROWING OF FEDERAL JURISDICTION

The Court of Appeals acknowledged that before the 1991 addition of paragraph (a)(6) to Fed. R. App. P. 4(a), district courts had jurisdiction under Fed. R. Civ. P. 60(b)(1)[3], upon a proper showing of lack of timely notice of the entry of an appealable order, to vacate a judgment and re-enter it in order to allow notice of appeal to be filed. See, e.g. *Kaercher v. Trustees of Health & Hosp. of Boston,* 834 F.2d 31, 34 (1st Cir. 1987); *Mizell v. Attorney Gen. of New York,* 586 F.2d 942, 944 n.2 (2d Cir. 1978), *cert. denied,* 440 U.S. 967 (1979); *Burkett v. Cunningham,* 826 F.2d 1208, 1216-17 (3d Cir. 1987); *Hensley v. Chesapeake & Ohio Ry. Co.,* 651 F.2d 226, 229-30 (4th Cir. 1981); *Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc.,* 523 F.2d 744, 750-51 (5th Cir. 1975), *cert. denied,* 425 U.S. 950 (1976); *Hough v. Local 134,* 867 F.2d 1018, 1022 (7th Cir.

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[3] "On motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . ."

1989); *Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978); *Rodgers v. Watt*, 722 F.2d 456, 459-60 (9th Cir. 1983) (en banc); *Wallace v. McManus*, 776 F.2d 915, 917 (10th Cir. 1985); *Harnish v. Manatee County*, 783 F.2d 1535, 1537-38 (11th Cir. 1986); *Case v. BASF Wyandotte*, 737 F.2d 1034, 1035 (Fed. Cir.), *cert. denied*, 469 U.S. 982 (1984).

Before the 1991 amendment, the only method for extending the thirty or sixty day time period for filing notice of appeal provided in Fed. R. App. P. 4(a)(1) was found in Rule 4(a)(5). That provision permits a party to move for an extension of time to file notice of appeal within thirty days of the due date. The 1991 amendment added Rule 4(a)(6), which provided a specific remedy when a party did not receive notice of an appealable order by allowing the court to "reopen" the time to file notice of appeal when a party had not received actual notice of an appealable order, but only if a motion under the rule was filed no more than 180 days after the entry of judgment. Fed. R. App. P. 4(a)(6). Mr. Higham learned of the final order in his case approximately three months too late to take advantage of Rule 4(a)(6).

The amendment to Rule 4 did not by its terms work any change in prior Rule 60 jurisprudence. In holding that the amendment to Rule 4 nonetheless deprived the district court of jurisdiction to vacate and re-enter a judgment under Rule 60 because of lack of notice, the Court of Appeals relied on an Eighth Circuit case and dicta in a Seventh Circuit case. Neither is persuasive.

In *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994), the Eighth Circuit case cited in the Seventh Circuit's opinion in this case, the court concluded that because the 1991 amendment to Fed. R. App. Pro. 4 specifically addressed the issue of lack of notice of judgment, it deprived the court of jurisdiction to grant the relief

requested under Fed. R. Civ. Pro. 60(b). Neither the rule itself nor the commentary to the rule expressly states any such intent. Further, the standard in Fed. R. App. Pro. 4(a)(6) for "reopening" the period to file notice of appeal is substantially less onerous that that required for relief under Fed. R. Civ. Pro. 60(b). Under Fed. R. App. Pro. 4(a)(6), the court may allow the late filing of notice of appeal if

> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

On the other hand, relief under Fed. R. Civ. Pro. 60(b) requires a finding of "mistake, inadvertence, surprise and/or excusable neglect" in addition to the finding of no notice required under Fed. R. App. Pro. 4(a)(6). The clear intent of the 1991 amendment to the appellate rule is to **ease** the burden on parties who received no timely notice of the entry of an appealable order, but acted within 180 days of judgment, rather than to **foreclose** relief for those who acted after that time.

The court in *Zimmer* added parenthetically that the issues raised by the appellant were without merit, and that therefore the court's holding did not in fact deprive the appellant of a remedy. This holding distinguishes *Zimmer*

from the case here. A further distinction between *Zimmer* and this case is that Zimmer could possibly obtain the relief he sought, money damages, in a proceeding against his counsel.

Zimmer was not a habeas corpus case. Unlike Zimmer, Mr. Higham can only receive the relief he seeks—a new trial—through an order of a court in this 28 U.S.C. §2255 proceeding. He may not file a subsequent §2255 petition, and he cannot receive relief from his conviction except by an order of a court. Thus, he has a compelling need to have the legal issues in his case resolved in the court of appeals.

In *Nowak v. INS*, 94 F.3d 390, 391 (7th Cir. 1996), the second decision cited by the Seventh Circuit, the court specifically noted that "Rule 4(a)(6) does not apply to administrative cases [like Nowak's], governed as they are by Rule 26(b)'s unforgiving approach." Nowak was appealing a decision that he be deported. His attorney did not file a brief for four years, after which time the administrative panel dismissed the appeal for want of jurisdiction. Thereafter, Nowak took no more action for two more years. During this time, Nowak was not in custody. He took advantage of the delay to enjoy years of life in the United States. Unlike Mr. Higham, who filed his motion under Rule 60(b) three days after receiving notice, Nowak certainly did not act promptly after learning of the status of the case.

While remarking that the prior cases holding that relief under Fed. R. Civ. Pro. 60(b) was available when there was lack of notice were "obsolete" after the 1991 amendment to Fed. R. App. Pro. 4(a), the *Nowak* court did not discuss why that might be so. The actual denial of relief to Nowak was premised upon the administrative rules, rather than Rule 4(a). Any equitable argument was clearly foreclosed by the fact that Nowak had profited by the delay for almost six

years. Mr. Higham, on the other hand, has been in custody continuously, and has gained no advantage by the much shorter seven month delay in his case.[4]

The better view is enunciated in *Lewis v. Alexander*, 987 F.2d 392 (6th Cir. 1993). There, the court upheld a district court's action in vacating a judgment under Rule 60(b) (1) and then re-entering it to make an appeal timely. The attorney representing the appellant had received notice of the judgment, and had attempted to file notice of appeal, but had inadvertently filed it out of time. By the time this error was discovered, the time for filing for an extension under Fed. R. App. Pro. 4(a)(5) had expired, so the notice was untimely. The court held that the granting of relief under Rule 60(b)(1) was within the discretion of the judge.

The court held that relief under Rule 60(b) was appropriate if there was lack of notice, no prejudice to the respondent, prompt filing of the Rule 60(b) motion after receiving notice, and due diligence by counsel. *Lewis v. Alexander*, 987 F.2d 392 (6th Cir. 1993):

> [I]n addition to finding that the lack of notice resulted from one of the Rule's enumerated reasons, the district court must also find a lack of prejudice to the respondent, prompt filing of the motion after actual notice, and due diligence, or sufficient reason for the lack thereof, by counsel in attempting to comply with the time constraints of Fed. R. App. P. 4(a).

These conditions are met in Mr. Higham's case. There is no jurisdictional bar to the grant of relief here, and

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[4] Under Fed. R. App. P. 4(a)(1)(B), Mr. Higham was required to file his notice of appeal on or before April 12, 1998, sixty days after the denial of the Rule 59 motion.

the district court and court of appeals erred in holding to the contrary.

II. THE DECISION OF THE COURT OF APPEALS IMPERMISSIBLY NARROWS THE HABEAS CORPUS JURISDICTION OF THE FEDERAL COURT.

The Court of Appeals based its decision on a principle it derived from civil cases not involving habeas corpus relief. In so holding, it ignored the uniqueness of the habeas corpus remedy. Habeas corpus is an ancient and revered method to correct wrongs for which no other remedy is available. It is "at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of *res judicata*." *Schlup v. Delo*, 115 S.Ct. 851, 863 (1995). As was held in *Ex Parte Yerger*, 75 U.S. 85, 95 (1868), "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."

Habeas corpus relief from a federal conviction is subject to strict procedural requirements. In particular, once a motion under 28 U.S.C. §2255 has been filed and decided, a successive motion cannot be filed except in conditions not present here. Thus, because of an error by the district clerk—not himself or his counsel—Mr. Higham has been denied the full access to his one complete remedy to attack his conviction. This denial amounts to a suspension of the writ of habeas corpus, forbidden by U.S. Const. Art. I, §9. In *Lonchar v. Thomas*, 517 U.S. 314, 324 (1966), the Court recognized this problem: "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."

The Court of Appeals and district court denied relief not because they found it was not warranted, but because of a mistaken notion about the jurisdiction to grant relief under Rule 60(b) (1). Neither rules of court nor statutes should be interpreted to restrict jurisdiction absent an expressed intent to do so. There is simply no indication in the history of the amendment to Fed. R. App. P. 4 that it intended to restrict the jurisdiction of courts to act under Fed. R. Civ. P. 60. Fed. R. App. P. 4(a)(6) speaks of "reopening" the time for filing the notice of appeal. It makes no reference to the relief requested here of vacating and re-entering judgment. Nor do the Advisory Committee notes mention the effect of the amendment on Rule 60. Under these circumstances, it would be improper to read into the amendment a jurisdictional change. See, e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1992) (Time limit provision which "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" is not jurisdictional).

The two cases cited by the district court and court of appeals in support of their decision that there is no jurisdiction are the only published decisions to suggest this reading. As noted previously, the discussion in *Nowak* is dictum, leaving only one decision in support of this anomalous reading of Rule 60 jurisprudence.

Mr. Higham's only chance for relief from his conviction lies in an opportunity to appeal from the decision of the district court, application of an unexpressed jurisdictional restriction is both unfair and unconstitutional. This Court should grant the writ of certiorari and reverse the decision of the court of appeals.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 26, 1999

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

BURTON HIGHAM Petitioner-Appellant,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99-1245 v.	]	
UNITED STATES OF AMERICA, Respondent-Appellee	]	No. 97 C 7428
	]	Suzanne B. Conlon, Judge

ORDER

On consideration of the "JURISDICTIONAL MEMORANDUM" filed by appellant on February 22, 1999, and the "GOVERNMENT'S JURISDICTIONAL MEMORANDUM" also filed on February 22, 1999, and review of the short record,

IT IS ORDERED that this appeal is SUMMARILY AFFIRMED. The district court denied appellant's Rule 60(b) motion because the court could not provide the relief that appellant sought - vacating and re-entering judgment to

provide appellant an opportunity to appeal. The district court properly denied the motion. *See Zimmer St. Louis, Inc. v. Zimmer*, 32 F.2d 357 (8th Cir. 1994; *see also Nowak v. INS*, 94 F.3d 390, 391-92 (7th Cir. 1996).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 23, 1999

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

BURTON HIGHAM Petitioner-Appellant,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99-1245 v.	]	
UNITED STATES OF AMERICA, Respondent-Appellee	]	No. 97 C 7428
	]	Suzanne B. Conlon, Judge

ORDER

On consideration of the "PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC" filed by counsel for appellant and the "ANSWER OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING," all members of the original panel voted to DENY rehearing. No judge in regular active service requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the petition for rehearing is DENIED.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge: Suzanne B. Conlon

CASE NUMBER: 97 C 7428
DATE: 1/11/1999

CASE TITLE: UNITED STATES V. HIGHAM

DOCKET ENTRY:

Petitioner Burton Higham's motion for relief from judgment under Rule 60(b)(1) [17-1] is denied. [SEE REVERSE FOR DETAILS].

/s/ Suzanne B. Conlon

On January 1, 1998, this court denied petitioner Burton Higham's motion to vacate, set aside, or correct his sentence. Higham moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). A minute order entered January 16, 1998 stated that the motion was taken under advisement and that the parties would be notified of the ruling by mail. On February 11, 1998, the court denied Higham's motion. However, due to an unknown error the order was never mailed. Neither Higham, his lead attorney, his local counsel, nor the United States Attorney received a copy of the order. *See* Higham Decl. at par. 3; Unger Carlyle Decl. at pars. 4, 8; Kle[illegible]r Decl. at par. 4. Higham asserts he would have appealed the ruling had he known of it. Higham Decl. at par. 4. But Higham's appeal would now be untimely. *See* Fed. R. App. P. 4(a). Higham seeks relief from the judgment pursuant to Fed. R. Civ. P. 60(b).

Under Rule 60(b), a movant may obtain relief from a final judgment for mistake, inadvertence, or excusable

neglect. A number of cases have used Rule 60(b) to revive a lost right of appeal when a losing party receives no notice of a final judgment. *See Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993) and cases cited therein. However, Fed. R. App. P. 4(a) was amended in 1991 to allow the trial court to reopen the period for appeal upon finding that the appellant had no notice of the final judgment within three weeks of its entry and that no party would be prejudiced. *See* Fed. R. App. P. 4(a)(6). The rule specifies that a motion to reopen the time for appeal must be made within 180 days of the entry of the judgment or order or within seven days of receipt of actual notice, whichever is earlier. *Id.* Thus, after 180 days from entry of the judgment, the time for filing appeal cannot be reopened even if the appellant had not actual notice of the judgment.

Lewis is the only case Higham cites using Rule 60(b) to revive a lost right of appeal after 1991.[5] But *Lewis* did not discuss Fed. R. App. P. 4(a)(6). In this regard, the court agrees with *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 361 (8th Cir. 1994) that *Lewis* is not persuasive authority. *Zimmer* determined that Fed. R. App. P. 4(a)(6) was designed to respond to situations that lead courts to use Rule 60(b) to circumvent deadlines for filing an appeal. Accordingly, district courts no longer have discretion under Rule 60(b) to revive a lost appeal more than 180 days after judgment is entered. *Id.* at 360.

Higham first brought the Rule 60(b) motion on November 20, 1998. Even if the court considered the motion

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[5] One other case since 1991 has used Rule 60(b) as Higham proposes. *See United States v. Brown*, 179 F.R.D. 323 (D. Ian 1998). However, in *Brown* the court expressly declined to apply Fed. R. App. P. 4(a)(6) only because the case involved a *pro se* prisoner. Higham was represented by counsel at all relevant times.

under Fed. R. App. P. 4(a)(6), it was untimely. Accordingly, the motion must be denied.

/s/

Suzanne B. Conlon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. 97 C 7428
BURTON HIGHAM,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Burton Higham ("Higham") moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

BACKGROUND

In 1994, Higham was deep in debt after the failure of two businesses. In December of that year, Higham sought the help of an acquaintance, John Burroughs, Jr., in collecting a $10,000 debt owed to his latest venture, Team Transport, Inc. Their discussions eventually turned toward another plan: killing Higham's partner in Team Transport -- Bill "Skip" Yates -- and collecting on the $250,000 insurance policy that Higham had taken out on Yates' life when the two partners formed their company. It is disputed whether Higham first came up with the idea to murder Yates, or whether Burroughs suggested it first and Higham warmed to the idea slowly. Regardless, Higham ultimately embraced the plan. The following events ensued:

> Burroughs ... contacted the FBI and helped arrange a meeting with Agent Jim Martin, who posed as a hit man willing to commit the murder for a $50,000 share of the life

> insurance proceeds. Higham and Martin met on January 17, 1995 and discussed the murder over coffee. Higham went on at length about his woes and the merits of Yates' anticipated demise. Martin instructed Higham to pay the back premiums on the life insurance policy, which was on the verge of lapsing, and to send him a copy of the policy along with a picture of Yates. After a number of followup telephone calls from Martin, Higham mailed him the policy and photograph ten days later. On February 6, Martin telephoned Higham and reminded him to bring the premiums up to date. On February 8, Martin met with Higham and told him that he had killed Yates. Higham was taken into custody immediately after that meeting.

United States v. Higham, 98 F.3d 285, 286-87 (7th Cir. 1996). Higham pursued an entrapment defense. After a jury trial, Higham was convicted of three counts of using the mail in the commission of a murder-for-hire scheme and three counts of mail fraud in violation of 18 U.S.C. §§ 1958(a) and 1341. On August 23, 1995, this court sentenced Higham to 180 months in prison. The Seventh Circuit affirmed his conviction. *See Higham*, 98 F.3d 285 (7th Cir. 1996).

In his § 2255 petition, Higham claims he was denied due process of law when "the prosecutor failed to disclose, prior to trial, a letter indicating [Burroughs] had begun cooperating with the government in December 1994 rather than January, [1995], and presented false testimony that the informant began cooperating in January, [1995]." Higham also claims he was denied effective assistance of counsel when (1) trial counsel failed to include the newly discovered letter in his motion for a new trial; (2) counsel failed to present available evidence to support his objection to the

obstruction of justice sentence enhancement; (3) counsel failed to present evidence at sentencing to rebut the government's evidence of a pattern of violence in Higham's conduct; and (4) appellate counsel failed to challenge Higham's sentence enhancement for obstruction of justice.

DISCUSSION

I. Procedural Requirements

"[R]elief under 28 U.S.C. § 2255 is limited to an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Bischel v. United States*, 32 F.3d 259, 263 (7th Cir.1994) (internal citations and quotations omitted) A petitioner is barred from raising constitutional issues in a section 2255 proceeding that could have been raised earlier, unless he demonstrates good cause and prejudice. *Bontkowski v United States*, 850 F.2d 306, 313 (7th Cir. 1988). Moreover, a petitioner cannot seek collateral review of claims addressed on direct appeal absent changed circumstances of fact or law. *Olmstead v. United States*, 55 F.3d 316, 319 (7th Cir. 1995).

II. Due Process

Higham claims that he and Burroughs first discussed killing Yates in December 1994. After trial but before sentencing, counsel for the government tendered to Higham's counsel a letter from an FBI supervisor to the United States Attorney. The letter, dated January 19, 1995, references a "December 11, 1994" meeting between federal authorities and Burroughs. Higham contends the letter is "critical" to show that during that first discussion, Burroughs was acting as a government agent for entrapment purposes. Higham claims he was denied due process because he was unable to use the letter at trial.

The government argues Higham's due process claim is not cognizable under § 2255 because the claim was made and rejected on direct appeal, and Higham fails to allege any changed circumstances of fact or law which would warrant collateral review. *See Olmstead*, 55 F.3d at 319. Higham concedes he raised the due process argument on direct appeal, but contends the Seventh Circuit did not consider his due process argument. Pet. at 10. On direct appeal, Higham argued the government failed to present sufficient evidence from which a jury could reasonably conclude that he was not entrapped. The Seventh Circuit rejected this argument. *See Higham*, 98 F.3d at 287 - 91. Higham also argued he was entitled to a new trial based on the newly discovered letter. The Seventh Circuit found Higham waived this issue, because he had received the letter prior to moving for a new trial and had not included the letter as a basis for that motion. *Id.* at 293.

The government insists the Seventh Circuit implicitly rejected Higham's due process argument when it rejected Higham's challenge to the sufficiency of the evidence. The court stated:

> Whether to believe Higham or Burroughs on this point [of whose idea it was to kill Yates] was the jury's choice and one we will not disturb. Moreover, even if we assume that Burroughs did float the idea, Higham himself conceded that he warmed to it and eventually signed on. Even if it took some persistence on Burroughs's part before Higham embraced the plan, in the absence of coercion, that alone does not establish inducement.... Neither Burroughs nor anyone else twisted [Higham's] arm with the sort of threats, extraordinary promises, or fraud that a showing of inducement requires.

Higham, 98 F.3d at 290 (citations omitted). Given the different legal standards involved, it would be surprising if the Seventh Circuit intended its discussion of the sufficiency of the evidence to serve as an alternative holding with respect to Higham's due process claim. Thus, the government's contention --that the Seventh Circuit rejected Higham's *due process* claim not only based on waiver but also on the merits -- is dubious. Although the court's analysis of the evidence strongly indicates it would have rejected the due process claim on the merits, the court did not explicitly so hold.

Nonetheless, assuming Higham's due process claim is cognizable, Higham fails to demonstrate actual prejudice from any alleged due process violation related to the letter. *See United States v. Frady*, 456 U.S. 152, 169 (1979). Indeed, in discussing the evidence that supported the jury's verdict (and the underlying finding of no entrapment), the Seventh Circuit alluded to the lack of evidence sufficient to support a finding that the government *induced* Higham to commit the crimes. "Neither Burroughs nor anyone else twisted [Higham's] arm with the sort of threats, extraordinary promises, or fraud that a showing of inducement requires." 98 F.3d at 290. Without evidence sufficient for a jury to find inducement, Higham's entrapment defense was doomed to fail -- whenever Burroughs became a government agent. Thus, Higham fails to establish a reasonable probability that had he presented the newly discovered letter at trial, the result of the proceedings would have been different. Accordingly, relief is unwarranted on the due process claim.

III. Ineffective Assistance of Counsel

For the first time, Higham argues he was denied effective assistance of counsel. Generally, a section 2255 motion may not substitute for direct appeal. However, an exception to this general rule is made for ineffective

assistance claims brought by defendants who were represented by the same attorney at trial and on direct appeal. *See Velarde v. United States*, 972 F.2d 826, 827 (7th Cir. 1992). Because Higham was represented by the same lawyer at trial and on direct appeal, he has not procedurally defaulted his ineffective assistance claims.

Higham claims he was denied effective assistance when his trial lawyer failed to include the newly discovered letter in his motion for a new trial. To state a valid claim for ineffective assistance, Higham must show (1) his counsel's performance was objectively unreasonable and (2) there exists a reasonable probability that, but for his lawyer's alleged errors, the results would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Higham cannot establish he was prejudiced by his lawyer's alleged error. To be sure, the letter may have proven useful in establishing when Burroughs became a government agent. However, as previously discussed, the evidence was insufficient to support a finding of inducement. Thus, even if Higham presented the letter at trial, it is not reasonably probable that his entrapment defense would have succeeded. Counsel's failure to mention the letter in his motion for a new trial did not prejudice Higham. Accordingly, relief is unwarranted.

Higham claims he was denied effective assistance when his lawyer failed to present available evidence at Higham's sentencing to support his objection to a two-level obstruction of justice enhancement "[R]elief under 28 U.S.C. § 2255 is limited to an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Bischel*, 32 F.3d 259, 263 (7th Cir.1994) (internal citations and quotations omitted). Thus, claims based directly on applications of the sentencing guidelines generally must be raised on direct appeal or not at all. Claims based on

ineffective assistance of counsel at sentencing, on the other hand, may be cognizable under section 2255. However, to satisfy the prejudice component of *Strickland*, Higham must demonstrate that his lawyer's allegedly deficient performance led to a "significant" increase in his sentence. *Durrive v United States*, 4 F.3d 548, 551 (7th Cir. 1993). The Seventh Circuit has explained as follows:

> Although we recognized in *Durrive* that any extra time in prison is significant from the defendant's perspective, we adopted a rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work.

Martin v. United States, 109 F.3d 1177, 1178 (7th Cir. 1996). Because Higham's ineffective assistance claim involves only a two-level sentence enhancement, he cannot satisfy the prejudice component of *Strickland*.

Higham contends he was denied effective assistance because his lawyer failed to present evidence at sentencing to rebut the government's evidence of a pattern of violence in Higham's conduct. Higham argues:

> The court cited evidence that movant had previously admitted holding a gun on another person. The Government's version of the offense, attached to the Presentence Investigation Report, indicated that the supposed victim of this offense did not recall the incident. Trial counsel failed to bring this to the attention of the court or to interview and obtain the ... testimony of this witness.

Pet. at 9. Higham's pattern of violence did not result in an increase in his offense level, and he was sentenced to 180 months in prison, well within the applicable range for offense level 34 (151 - 188 months) . By the standards set forth in *Durrive* and *Martin*, the alleged error by Higham's lawyer did not result in a significant increase in Higham's sentence. Thus, relief is unwarranted. Even assuming Higham's claim is cognizable, Higham fails to meet either prong of the *Strickland* test. First, Higham suffered no prejudice from the alleged error, because the government already informed the court that the alleged victim would not likely corroborate Higham's admission that he had previously held a gun on another person. Second, Higham fails to establish his lawyer's assistance fell outside the wide range of reasonable, professionally competent representation.

Finally, Higham claims he was denied effective assistance because his appellate counsel failed to challenge the sentence enhancement for obstruction of justice. By its terms, section 2255 does not provide redress for alleged ineffective assistance on appeal. Moreover, given the relative merit and importance of the other issues raised on appeal, counsel's decision not to pursue the obstruction enhancement issue plainly falls within the wide range of reasonable, professionally competent representation. Accordingly, relief is unwarranted.

Burton Higham's motion to vacate, set aside, or correct his sentence is denied.

ENTER:
Suzanne B. Conlon, United States District Judge
January 2, 1998

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTIONAL PROVISION

ARTICLE I, §9
HABEAS CORPUS CLAUSE

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

U. S. STATUTE

28 U.S.C. §2255
Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the

court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

U.S. COURT RULES

FEDERAL RULE OF CIVIL PROCEDURE 60(B)(1)
Relief from Judgment or Order
Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order of proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due

diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsice), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a resonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (b) does not affect the finality of a judgment or suspend its operation. This rule does not operate to limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in this rules or by an independent action.

FEDERAL RULE OF APPELLATE PROCEDURE 4(A)
Appeal as of Right—When Taken
Appeal in a Civil Case

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules (4)(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a) whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B)(i) If a party filed notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining judgment is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) The motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry defined. A judgment or order is entered for the purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

MOTION, PURSUANT TO SECTION 2255 OF TITLE 28
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
ATTACKING A SENTENCE IMPOSED BY THAT COURT

Name: **Burton Higham**

Prison Number: **06503-424**

Place of Confinement: **FCI Florence, Colorado**

United States District Court, Northern District of Illinois

Case No: **97C 7428** (to be supplied by Clerk of the U.S.

District Court) Sentencing Judge: **Hon. Suzanne Conlon**

United States,

v.

Burton Higham

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE
BY A PERSON IN FEDERAL CUSTODY

(1) This motion must be legibly handwritten or typewritten, and signed by the **movant** under penalty

of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your motion will be filed if it is in proper order.

(4) If you do not have the necessary funds for transcripts, counsel, appeal and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking

relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and one copy* must be mailed to the Clerk of the United States District Court whose address is **Clerk, United States District Court, Northern District of Illinois, 219 S. Dearborn St., Chicago, IL 60604.**

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack: **U.S. District Court, Northern District of Illinois, Chicago, Illinois.**

2. Date of judgment of conviction: **August 23, 1995**

3. Length of sentence: **180 months.**

4. Nature of offense involved (all counts): **murder for hire (3 counts), mail fraud (3 counts)**

5. What was your plea? (Check one)

   (a) Not guilty **X**

   (b) Guilty _____

(c) Nolo contendere _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one) (a) Jury X (b) Judge only ___

7. Did you testify at the trial? Yes [X] No [ ]

8. Did you appeal from the judgment of conviction?

Yes [X] No [ ]

9. If you did appeal, answer the following:

(a) Name of court: **U.S. Court of Appeals, Seventh Circuit**

(b) Result: **Conviction affirmed**

(c) Date of result: **October 18, 1996**

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes [ ] No [X]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court:
(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [ ]

(5) Result:

(6) Date of result:

(b) As to any second petition, application, or motion give the same information:

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No []

(5) Result:

(6) Date of result:

(c) As to any third petition, application, or motion give the same information:

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [ ]

(5) Result:

(6) Date of result:

(d) Did you appeal to the highest state court having jurisdiction the result of the action taken on any petition, application or motion?

(1) First petition, etc. Yes [ ] No [ ]

(2) Second petition, etc. Yes [ ] No [ ]

(3) Third petition, etc. Yes [ ] No [ ]

(e) If you did *not* appeal from the adverse action on any petition, application, or motion, explain why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in the motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement proceeded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence seized pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: **Movant was denied due process of law when the prosecutor failed to disclose, prior to trial, a letter indicating that the informant had begun cooperating with the government in December, 1994 rather than January, 1994, and presented false testimony that the informant began cooperating in January, 1994.**

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

Movant's defense at trial was that he had been entrapped by John Burroughs into committing the charged offenses, and that Burroughs had suggested to him in December, 1994, that he arrange for the intended victim, Yates, to be killed for insurance proceeds. The government presented evidence tending to show that the contact between movant and Burroughs began in December, 1994, but Burroughs's cooperation with the government did not

begin until January, 1995. Hence, the government argued, Burroughs was not a government agent at the time he began to induce movant to commit the offense, and the entrapment defense did not apply. The jury was instructed that it could only find entrapment if it found that Burroughs was a government agent at the time the plan for the murder was first broached.

After trial but before sentencing, counsel for the government tendered to defense counsel a letter from FBI supervisor James Lyle to U.S. Attorney James Burns dated January 19, 1995 which referenced a meeting between government agents and Burroughs on December 11, 1994. A copy of the letter is attached to this motion. This letter was obviously critical to movant's contention that he had been entrapped by a government agent.

At best, the failure of the government to disclose this letter in a timely manner denied the movant effective assistance of counsel and the right to confrontation and cross-examination of witnesses in that he was unable to cross-examine the government's witnesses on their contention that the first contact occurred in January using this letter. This is the case even if, as the government suggested in its appellate brief, the date in the letter was an error.

However, the existence of this letter to an assistant U.S. Attorney also strongly suggests that the government knowingly presented false testimony that the first contact was in January, in violation of movant's right to due process of law.

B. Ground two: **The movant was denied effective assistance of counsel when trial counsel failed to include the fact that the letter from Lyle to Burns was withheld in his motion for new trial.**

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

At the time he filed a motion for new trial based on newly discovered evidence, trial counsel was aware of the letter described in Ground One above. However, in his motion, he mentioned only another late-discovered document. As a result, when the failure to disclose the letter was raised as a point of error on appeal, the court of appeals deemed that it had been waived because it had not been properly raised in the trial court.

C. Ground three: **Movant was denied effective assistance of counsel when counsel failed to properly object at trial, or to raise an issue on appeal, as to the obstruction of justice enhancement to his sentence.**

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

In the Presentence Investigation Report, the probation officer recommended a two-level increase in movant's offense level because movant's perjury at trial was obstruction of justice. Trial counsel objected to this recommendation at sentencing, but failed to bring to the court's attention the letter described above, which was in counsel's possession at that time. The perjury enhancement was based in part upon a finding that the defendant's statement that he was aware of the existence of the undercover FBI statement in December, 1994, was false. In addition, the government suggested that movant lied when he said that the information about the insurance policy was available to Bill Warren because Warren had no position in Team Transport. Trial counsel failed to present evidence that Warren was the president of Team Transport. Finally, trial counsel failed to present available evidence that movant's testimony that he knew Yates was not dead because he had asked a friend to call Yates was true. Had this evidence been before the trial court, there is a reasonable probability that this enhancement would not have been imposed.

D. Ground four: **Movant was denied effective assistance of counsel at sentencing when trial counsel failed to present evidence to rebut the government's assertions that there was a pattern of violence in the movant's conduct.**

Supporting **FACTS** (tell your story *briefly* without citing cases or law)

In reciting her reasons for imposing the maximum sentence allowed by law, at the top of the guideline range, the court cited evidence that movant had previously admitted holding a gun on another person. The Government's version of the offense, attached to the Presentence Investigation Report, indicated that the supposed victim of this offense did not recall the incident. Trial counsel failed to bring this to the attention of the court or to interview and obtain the sentencing testimony of this witness. In that the trial court expressly relied on this incident in imposing sentence at the upper end of the sentencing range, it is reasonably certain that movant would have received a lesser sentence if this evidence had been before the court.

E. Ground five: **Movant was denied effective assistance of appellate counsel when counsel failed to raise on appeal the application of the enhancement for obstruction of justice.**

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

Although trial counsel made an objection at sentencing to the application of the obstruction enhancement, he did not include the impropriety of this ground as an issue on appeal. In that the case law concerning the applicability of the obstruction enhancement based on the defendant's trial testimony is a serious factual and legal issue, it should have been raised on appeal. Had it been so raised,

there is a reasonable probability that appellate relief on sentencing would have been ordered.

13. If any grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: **Grounds B, C and D and E have not been previously presented because this motion is the only available remedy for these grounds. Ground A was presented by appellate counsel but was not considered by the appellate court.**

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing **Camille Conway,**

Federal PD

(b) At arraignment and plea **Kevin Milner, 53 W. Jackson Blvd., Ste. 1460, Chicago, IL 60604**

(c) At trial **Kevin Milner**

(d) At sentencing **Kevin Milner**

(e) On appeal **Kevin Milner**

(f) In any post-conviction proceeding **N/A**

(g) On appeal from any adverse ruling in a post-conviction proceeding **N/A**

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes [**X**] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes [ ] No [**X**]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing any petition attacking the judgment which imposed the sentence to be served in the future?
Yes [ ] No [ ]

Wherefore, movant prays that the court grant movant relief to which movant may be entitled in this proceeding.

/s/

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ATTORNEY FOR MOVANT

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on 10-8-97.

/s/ Burton Higham

Signature of Movant

IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff	§ § §	
VS.	§	NO. 97 C 7428
BURTON HIGHAM Defendant	§ § § §	

MOTION TO ALTER OR AMEND JUDGMENT

Movant Burton Higham moves the court, pursuant to Rule 59(e), Fed. R. Civ. Pro., to alter and amend its memorandum opinion, order and judgment in this cause entered January 2, 1998. In support of this motion, movant states as follows.

I. Standard for relief under Rule 59(e).

In *Moro v. Shell Oil Co.*, 91 F.3d 872 (7th Cir. 1996), the court held, "Rule 59(e) allows a party to direct the district court's attention to newly discovered material evidence or a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures." The court cited *Russell v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir.1995).

Here, the court entered its order without benefit of movant's analysis of the government's response to his motion, despite the fact that movant moved for leave to file a

traverse to that response. Thus, examination of the order for errors of fact and law is particularly appropriate here.

II. Errors of fact

The version of the facts presented in the order does not do justice to the theory under which movant's case was tried. Movant offered, as a defense, that he had been entrapped by Burroughs while Burroughs was working as a government agent. He testified that it was Burroughs who suggested, in December, 1994, that Yates be killed. Trial transcript (Tr.), pp. 297, 299. Movant also testified that during the December conversations, Burroughs told him about "Jim White," or "Jim Martin," a friend who would help with the collection of movant's debt from Yates. Tr. p. 295, 311.

Martin and Roberts, the FBI agents, testified that they did not make arrangements for Burroughs to work with them until January, 1995. Tr. p. 51, 165. Burroughs's own testimony about the date the issue of killing Yates was first discussed varied from December to January. Tr. pp. 241, 243, 245.

This court instructed the jury that they could accept the entrapment defense *only* if they found that Burroughs induced movant to enter into an agreement to have Yates killed during a time when Burroughs was cooperating with the government. Tr. p. 448.

The jury found the defendant guilty. Obviously, then, they believed either the testimony of the FBI agents that Burroughs was not a government agent until January, OR they believed Burroughs's testimony that the idea for the hired killing was movant's and that he was not induced to enter into the plan by Burroughs.

III. Error of Law: Prejudice from prosecutorial misconduct and ineffective assistance of counsel in connection with suppressed material evidence.

In its order, this court found that movant had not established prejudice from the prosecutor's misconduct in failing to disclose evidence material to the movant's theory of the case, or from his counsel's failure to present the letter as newly discovered evidence in his motion for new trial. In so holding, the court adverted to the finding of the Seventh Circuit as to the sufficiency of evidence issue raised on direct appeal. However, in relying on this holding, this court applied an incorrect standard of review.

On direct appeal when a claim of insufficiency of evidence is made, the court of appeals considers the evidence "in the light most favorable to the government." *United States v. Higham,* 98 F.3d 285, 287 (7th Cir. 1996), citing *United States v. Gonzalez*, 93 F.3d 311, 319 (7th Cir. 1996). However, the standard for determining prejudice from prosecutorial misconduct and ineffective assistance of counsel is much different.

When beneficial evidence is not disclosed, the U.S. Supreme Court in *United States v. Bagley*, 473 U.S. 667 (1984) held that a new trial is required if the failure to disclose was "material," noting,

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. See also *United States v. Walgren*, 885 F.2d 1417, 1427-1428 (9th Cir. 1989).

The standard for prejudice from ineffective assistance of counsel, found in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), is substantially similar. In determining prejudice, the court must find that counsel's errors created a "reasonable probability" that the result would be different.

On direct appeal in this case, the court of appeals held that the evidence was *legally* sufficient to convict movant. In so doing, as the law requires, it considered the evidence in the light most favorable to the government, and determined that the evidence was sufficient for a reasonable jury to find the defendant guilty. *Jackson v. Virginia*, 443 U.S. 307 (1979). This was a correct legal conclusion, because evidence was presented indicating both that appellant was not induced and that the inducement, if it occurred, occurred before Burroughs began working for the government. Under either theory, the jury was entitled to convict appellant, and hence the *Jackson v. Virginia* test was met.

However, because it declined to consider appellant's due process claim of suppression of evidence, the court of appeals did not attempt to consider the effect on the trial of the case of the suppressed evidence, as this court must do in evaluating prejudice under *Bagley* and *Strickland*. Nor did the court of appeals use the "reasonable probability" test to evaluate that harm.

A "reasonable probability" that the result would have been different *does not* require a finding by this court that, if the evidence had been disclosed, the movant would have been acquitted at trial. Rather, it requires only that the probable consequences of the failure to disclose undermine confidence in the outcome. *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990).

Here, the harm from the failure to suppress the evidence is evident from the nature of the suppressed

evidence, and could be further developed in an evidentiary hearing. The evidence at issue was a letter indicating that the testimony of the FBI agents that no arrangements were made with Burroughs until January, 1995 was at best incorrect and at worse false. The government argues, without supporting affidavits or other evidence, that the date in the letter was a typographical error. However, that was a matter for the jury to resolve at trial if the government chose to present evidence on the issue there.

Had it been properly disclosed, the letter could have been effectively used to impeach the testimony of the FBI agents, who were the witnesses who were most definite about the time the inducement occurred. Burroughs, who was called by the defense as an adverse witness, could also have been confronted with it. Further, the letter strongly corroborated appellant's testimony that Burroughs told him about "Jim White" in December. This would have been impossible had Burroughs not met Martin until January. The fact that appellant was unable to produce evidence other than his own testimony about the December meeting thus detracted from appellant's credibility.

Essentially, the case turned on the jury's determination about the relative credibility of Burroughs and appellant as to the circumstances under which the killing of Yates was planned. The suppressed evidence was extremely material to this determination. Under those circumstances, a "reasonable probability" exists that the outcome would have been difficult.

In *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990), the court found a "reasonable probability" that the failure to call available witnesses would have changed the result where the failure to call the witnesses left the jury free to believe the government's account of the facts as the only available account of the story. The situation here is strongly similar.

The fact that the evidence was *legally* sufficient to convict the appellant does not permit this court to deny relief here.

IV. Error of Law: Prejudice from ineffective assistance of counsel at sentencing.

Citing *Durrive v. United States*, 4 F.3d 548, 551 (7th Cir. 1993) and *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1997), this court holds that the increase in movant's sentence which could be attributed to ineffective assistance of counsel at sentencing is not sufficiently "significant" to allow him to litigate his claims of ineffective assistance of counsel at sentencing in this proceeding.

Movant alleged two deficiencies in his representation at sentencing. First, he alleged that counsel failed to object and to present evidence which would have resulted in the court's declining to impose the two level increase in offense level for obstruction of justice. In movant's case, this reduction in offense level would have changed his sentencing guideline range from 151-188 months at level 34 to 121-151 months at level 32. Thus, his actual sentence of 180 months was 29 months longer than would have been permissible under the correct offense level. While *Durrive* suggests that any calculation error involving only a few offense levels is insignificant, it is worth noting that in *Durrive*, the actual difference made by the alleged error was only twelve months. In *Martin*, the argument concerned a sixteen month difference between the actual sentence and the top of the correct guideline range. The difference here is almost twice as long.

Movant's second claim of ineffective assistance of counsel at sentencing is that trial counsel failed to rebut evidence in movant's PSI which suggested that his life exhibited a "pattern of violence." This court holds that

because his sentence was "well within" the guideline range, this error is not sufficiently significant to warrant review. It should be noted that appellant's sentence, while within the guideline range of 151-188 months, is 29 months from the bottom of the range and only 8 months from the top. As the sentencing judge, this court is of course in a position to make a conclusion as to whether the lack of evidence that movant was not a violent person by nature affected the placement of his sentence within the sentencing range. Movant submits, however, that this conclusion could better be drawn after an evidentiary hearing at which movant could present the evidence which should have been presented at sentencing. Assuming that the court found that this evidence would have resulted in a sentence at the lower end of the guideline range rather than at the upper end, the difference is significant enough, even under *Durrive*, to merit relief.

Thus, movant contends that, even under the *Durrive* rule, the difference in sentence caused by ineffective assistance of counsel is sufficiently "significant" for the claim to require review by this court.

Further, the rule in *Durrive* bears re-examination by the court. Dissenting from the denial of rehearing in *Martin*, Circuit Judge Ilana Diamond Rovner, joined by two other circuit justices, noted that the *Durrive* decision provides no guidance for this or any other court in determining when a sentencing error results in a "significant" increase in sentence. *Martin v. United States*, 109 F.3d 1177, 1183 (7th Cir. 1997). In *United States v. Kissick*, 69 F.3d 1048 (10th Cir.1995), *cert. denied*, 117 S.Ct. 1008, 136 L.Ed.2d 886 (1997), the Tenth Circuit, applying the rule of *Durrive*, found that an increase was "significant" when the defendant's actual sentence was only one month longer than the maximum permitted under the guideline he argued was correct.

In light of the likelihood of inconsistent results, the application of the *Durrive* rule is a violation of due process because of its inherent arbitrariness. For the same reason, the rule constitutes an unconstitutional suspension of the writ of habeas corpus in violation of U.S. Const. Art. I, §9.

In urging this court to revisit its reliance on the *Durrive* rule, movant can make no argument more eloquent than that of Judge Rovner:

> [A]lthough the court is willing to assume that a sentencing error was made and left unaddressed as the result of the ineffectiveness of Martin's counsel, and it is willing to assume that the error increased Martin's sentence, it refuses to entertain the prospect of relief. If there is no redress for the denial of effective assistance of counsel, then practically speaking there is no real right to such assistance. In *Durrive*'s language, only a "grave error" producing a "large effect" on the sentence might support relief on collateral review. 4 F.3d at 551. That language, it would appear, sets the bar for the quality of advocacy that a defendant can expect when it comes to sentencing issues: the defendant is entitled only to an attorney who does not overlook "grave *1185 errors" having a "large effect" on the sentence. I am less than confident that this can be reconciled with the standard that the Supreme Court articulated in *Strickland.*

Martin v. United States, 109 F.3d 1177, 1183 (7th Cir. 1997) (Rovner, J. dissenting from denial of rehearing *en banc*.)

V. Error of Law: Ineffective assistance of appellate counsel.

This court's discussion of this issue begins with the assertion that 28 U.S.C. §2255 does not address ineffective assistance of appellate counsel. However, it is widely used to address claims which should have been presented on appeal but which were not because of ineffective assistance of appellate counsel. A recent example of this is found in *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1997), where the court discussed Martin's claim that sentencing issues should have been raised on appeal. Although, as discussed in the previous section, the court decided not to reach the issues, it did not do so on the ground that they were not properly raised in the 2255 proceeding. See also *Rogers v. United States*, 1 F.3d 697 (8th Cir. 1993) (reviewing claim of ineffective assistance of appellate counsel on the merits). Thus, this court clearly has jurisdiction to review movant's claim.

This court's conclusory finding that "given the relative merit and importance of the other issues on appeal," the decision not to pursue this issue could not be effective assistance of counsel is not warranted by the record. This court has, in violation of *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990), "construct[ed] strategic defenses which counsel does not offer." Without an evidentiary hearing or at least an affidavit of counsel suggesting that the decision not to pursue this ground was actually a part of the appellate strategy, this court's finding is, under the rule of *Harris v. Reed*, clearly erroneous.

CONCLUSION

For the foregoing reasons, movant prays the court to:

1. Set aside its judgment of January 2, 1998;

2. Grant movant's pending motion to file a traverse as to the issues which were not reached by the court's memorandum order and hence are not addressed in this motion, in particular the merits of movant's contentions that the government suppressed evidence and that he was denied effective assistance of counsel at sentencing and on appeal; and

3. Order an evidentiary hearing to resolve the contested factual matters raised by those issues.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served upon opposing counsel Zachary T. Fardon, Asst. U.S. Attorney, 219 S. Dearborn St., Chicago, IL 60604 by U.S. Mail on January 14, 1998.

/S/

ELIZABETH UNGER CARLYLE